No. 135.

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OCTOBER TERM, 1899.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND S. H. H. CLARK *et al.*, RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY, *Plaintiffs in Error*,

vs.

LISSA MARTIN, ADMINISTRATRIX OF THE ESTATE OF WILLIAM MARTIN, DECEASED, *Defendant in Error.*

No. 135.

BRIEF FOR PLAINTIFFS IN ERROR.

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vs.

LISSA MARTIN, ADMINISTRATRIX OF THE ESTATE OF WILLIAM MARTIN, DECEASED, *Defendant in Error.*

No. 135.

BRIEF FOR PLAINTIFFS IN ERROR.

THIS suit was brought by Lissa Martin as administratrix of the estate of William Martin, deceased, against The Chicago, Rock Island & Pacific Railway Company and the Receivers of the Union Pacific Railway Company, in the District Court of Clay county, Kansas, to recover $10,000 damages for the death of the decedent.

The petition alleges in substance, (Record, p. 31,) that The Chicago, Rock Island & Pacific Railway Company had leased and was using the tracks of the Union Pacific Railway Company between Topeka, Kansas, and Kansas City, Missouri; that on the 2d day of January, 1894, William Martin was riding as a passenger on a train being

operated by the Receivers of the Union Pacific Railway Company between Topeka and Kansas City; that the rear end of the train occupied by him was run into by a train of The Chicago, Rock Island & Pacific Railway Company; that the death of said William Martin was caused by the gross and wanton negligence of the men in the employ of each and all of the defendants in operating both of said trains, and because of the want of ordinary care and skill in moving and operating both of said trains, at or near the town of Linwood, in the county of Leavenworth, State of Kansas. The petition also alleges the appointment of Lissa Martin as administratrix, the incorporation of The Chicago, Rock Island & Pacific Railway Company, and of the Union Pacific Railway Company. The petition also makes the following allegations in regard to the appointment of the Receivers of the Union Pacific Railway Company, (Record, p. 32):

"Plaintiff further avers that on the — day of ——, 1893, by order and decree of the Circuit Court of the United States in and for the District of Nebraska, the above-named defendants, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane and Frederick R. Coudert, were duly appointed, according to law, Receivers of the Union Pacific Railway Company; that long prior to the 2d day of January, 1894, each of said defendants had qualified, as provided by law, as such Receivers, as aforesaid, and were long before said last-mentioned date in full possession of all the lines of road belonging to the said The Union Pacific Railway Company, including the aforementioned lines in the State of Kansas, and were, on the said second day of

January, 1894, operating said lines in Kansas, including the one running through the county of Clay, in said State, and also the line leading from Kansas City westward to and through the city of Topeka, as heretofore referred to as being under lease to and operated by the defendant, The Chicago, Rock Island & Pacific Railway Company."

Plaintiff's petition was filed January 26, 1894. On the 14th of February, 1894, The Chicago, Rock Island & Pacific Railway Company filed its separate answer. (See Record, p. 34.)

On the 20th of February, 1894, "and before the time had expired in which to answer or plead to said plaintiff's petition, the said defendants, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert, as Receivers of the Union Pacific Railway Company, filed with the clerk of said court their petition and bond praying for the removal of said cause to the United States Circuit Court for the District of Kansas," which petition for removal, omitting the caption, signatures of counsel, and verification, reads as follows (Record, p. 34):

"*To said District Court:* Your petitioners, the above-named S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and Frederick R. Coudert, Receivers, defendants in the above-entitled cause, respectfully show to this honorable court that the matter and amount in dispute in said cause exceeds, exclusive of interest and costs, the sum or value of five thousand dollars.

"Your petitioners further allege that the said S. H. H. Clark, Oliver W. Mink and E. Ellery Anderson were, upon

the 13th of October, 1893, appointed Receivers of the Union Pacific Railway Company by the Circuit Court of the United States for the District of Nebraska; that they were appointed ancillary Receivers of said Union Pacific Railway Company by the Circuit Court of the United States for the District of Kansas upon the same day; that thereafter, upon, to wit, the 13th day of November, 1893, J. W. Doane and Frederick R. Coudert were appointed additional Receivers of said Union Pacific Railway Company by said United States Circuit Court for the District of Nebraska, and thereafter, to wit, upon the 27th day of November, 1893, said J. W. Doane and F. R. Coudert were appointed additional ancillary Receivers of said railway company by the United States Circuit Court for the District of Kansas.

"That immediately after their respective appointments as Receivers of said railway company they qualified as such Receivers and entered upon the discharge of their duties as such, and have been in the exclusive possession and control of the trains and other property of said Union Pacific Railway Company since their appointment as Receivers as aforesaid.

"Your petitioners further show to the court, that said Union Pacific Railway Company was at the time of the commencement of this suit and still is a corporation created by the consolidation of the Union Pacific Railroad Company, created and existing under an act of Congress entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes,' approved July 1, 1862; the Kansas Pacific Railway Company, mentioned in said act of Congress as the Leavenworth, Pawnee & Western Railroad Company, a corporation created under the laws of Kansas, organized and operating its railroads

in said State, and a citizen thereof, and the Denver Pacific Railway and Telegraph Company, a corporation created by virtue of the laws of Colorado, operating a road in that State, and a citizen thereof, such consolidation having been made by virtue of the authority contained in said act of Congress and amendments thereto and other acts of Congress authorizing the same; that said S. H. H. Clark is and was at the time of the commencement of this action a citizen of the State of Missouri; that said Oliver W. Mink is and was at the time of the commencement of this action a citizen of the State of Massachusetts; that said E. Ellery Anderson is and was at the time of the commencement of this action a citizen of the State of New York; that said J. W. Doane is and was at the time of the commencement of this action a citizen of the State of Illinois; that said F. R. Coudert is and was at the time of the commencement of this action a citizen of the State of New York; that the said plaintiff is and was at the time of the commencement of this action a citizen of the State of Kansas; that said Chicago, Rock Island & Pacific Railway Company is and was at the time of the commencement of this action a corporation organized and existing under the laws of the States of Illinois and Iowa, and a citizen of said States.

"Your petitioners further allege that the controversy in said suit is one between your petitioner and said Lissa Martin, administratrix, plaintiff, and that said suit is one arising under the laws of the United States.

"Your petitioners offer herewith a bond, with good and sufficient surety, for their entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

"And your petitioners pray this honorable court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States for the District of Kansas, first division; and they will ever pray."

On the 13th of March, 1894, the application of the Receivers of the Union Pacific Railway Company for the removal of said cause to the Circuit Court of the United States for the District of Kansas came on for hearing before the District Court of Clay county, Kansas, and was by that court overruled; the Receivers of the Union Pacific Railway Company duly excepting. The court specifically found that the bond which accompanied the petition for removal was good and sufficient. (See Record, p. 38.)

Thereupon the Receivers of the Union Pacific Railway Company filed their answer to plaintiff's petition and the case proceeded to trial. Among the other defenses set up in their answer was the following one (Record, p. 39):

"That this court has no jurisdiction of the matter in controversy in this suit, for the reason that these defendants at the proper time duly filed their petition and bond for the removal of this cause to the Circuit Court of the United States, District of Kansas."

The defendants, Receivers of the Union Pacific Railway Company, and The Chicago, Rock Island & Pacific Railway Company, also objected to the introduction of any testimony in the case, because the court had no jurisdiction of it, on the ground that the Receivers of the Union Pacific

had filed their petition and bond for the removal of the case to the Circuit Court of the United States, and had filed a transcript of the proceedings in the Federal court as required by law. (Record, p. 40.) This objection was by the court overruled, the defendants at the time duly excepting. (Record, p. 40.)

The jury returned a verdict in favor of the plaintiff and against all the defendants for $10,000. Motions for a new trial were filed by all the defendants, setting forth, among other things, that the court had erred in refusing to sustain the application of the Receivers of the Union Pacific Railway Company for the removal of said case to the Circuit Court of the United States for the District of Kansas, and because the court had lost jurisdiction thereof upon the filing of the petition and bond for removal. (See Record, pp. 42, 44.)

These motions were overruled, the defendants excepting thereto, and judgment entered in favor of the plaintiff and against all the defendants for the sum of $10,000 and costs. (Record, p. 45.) The case was taken on error to the Supreme Court of the State of Kansas, by The Chicago, Rock Island & Pacific Railway Company and the Receivers of the Union Pacific Railway Company. By order of that court, made as of May 3, 1898, the two appeals were consolidated under the title of The Chicago, Rock Island & Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R.

Coudert, as Receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* Lissa Martin, administratrix of the estate of William Martin, deceased, defendant in error. (See Record, p. 54.)

Among the errors complained of in the petition in error filed by The Chicago, Rock Island & Pacific Railway Company in the Supreme Court of Kansas was the following (Record, p. 5):

"12. That the court erred in overruling the petition and application of the defendants below, S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert, as Receivers of the Union Pacific Railway Company for the removal of said cause to the United States Circuit Court, and erred in refusing to remove said cause to said Circuit Court, as shown on page 16 of said case-made."

Among the errors complained of by the Receivers of the Union Pacific Railway Company in the petition in error filed in the Supreme Court of Kansas, were the following (Record, p. 2):

"15th. Because the court lost jurisdiction of said cause upon the filing by said Receivers of their petition and bond for the removal of said cause to the United States Circuit Court for the District of Kansas, and thereafter said court had no power to proceed with the trial of said cause.

"16th. Because the court erred in refusing to sustain the application of said Receivers for the removal of said cause to the United States Circuit Court for the District of Kansas."

The Supreme Court of Kansas affirmed the judgment of the lower court. (Record, p. 46.) Among the errors assigned by the plaintiffs in error and passed upon by the State Supreme Court were those arising from the refusal of the State court to remove the case to the Federal court upon the application of the Receivers of the Union Pacific Railway Company.

Upon those questions the court held that the Receivers of the Union Pacific Railway Company could not remove the case unless their co-defendant, The Chicago, Rock Island & Pacific Railway Company, joined with them in making the necessary application. The opinion of the court upon this subject reads as follows (Record, p. 52):

"On behalf of the Receivers, the first contention is that a petition and bond for a removal of the cause to the Circuit Court of the United States for the District of Kansas was duly filed and the bond approved, but the court refused to order the removal, and that the court thereby lost jurisdiction, and thereafter had no power to proceed. The answer of the Rock Island Company was filed on the 14th of February. The petition and bond of the Receivers for removal were filed on the 20th of the same month. The Rock Island Company did not join in the application for removal, but it is now insisted by this company, as well as by the Receivers, that the District Court lost jurisdiction by the filing of the petition and bond. It is said that the Union Pacific Railway Company has a right to remove causes from the State to the Federal courts by reason of a Federal court question being involved; that its Receivers have a right to remove because of their appointment by the Federal court. It is con-

tended that conceding the right of the plaintiff to sue both defendants jointly, the Receivers have a right to remove without being joined in the petition by the Rock Island Company, because the removal is based on the ground that a Federal question is involved. It is conceded that if a right of removal had been claimed solely on the ground of citizenship, it would have been necessary for all the defendants to join, but being based on the proposition that a Federal question was involved, it is claimed that such joinder was unnecessary. In support of this claim, the following cases are cited: *Ames v. Union Pacific,* 111 U. S. 449; *Pacific Removal Cases,* 115 U. S. 1; *Mitchell v. Smale,* 140 U. S. 406; *Ry. Co. v. Cox,* 145 U. S. 593; *Texas & Pacific Ry. Co. v. Cody,* 116 U. S. 606, and 17 Supreme Court Reporter, 703; *Evans v. Dillingham,* 43 Federal, 177; *Seattle &c. Ry. Co. v. State,* 52 Federal, 596; *Trust Co. v. Ry. Co.,* 59 Federal, 523; *Southern Pac. Ry. Co. v. Townsend,* 62 Federal, 161; *Landers v. Felton,* 73 Federal, 311; *Lund v. The C. R. I. & P. Ry. Co.,* 78 Federal, 385. The only ones of the cases cited that seem to us to support this contention are those from the 52 and 78 Federal Reporter. Our own construction of the Federal statute on the subject (section 2, page 612, Supplement to the Revised Statutes of the United States) is, that it was necessary for both defendants to join in the petition for a removal. They were charged with jointly causing the death of the plaintiff's intestate. The controversy was not separable, and the Receivers alone had no right to removal on the ground that a Federal question was involved. No Federal question was in fact presented by the pleadings nor litigated at the trial. It was the ordinary action under our statute for wrongfully causing the death of the plaintiff's intestate. In the view that both defendants must join in the petition for removal, we are supported by able Federal judges in the cases of *Thompson v. C. St. P. & K. C. Ry.*

Co., 60 Federal, 773; *Shearing v. Trumbull*, 73 Federal, 33; and by *Texas & Pacific Ry. Co. v. Young*, 27 S. W. 145; Black's Dillon on Removal of Causes, section 77."

The statutes of Kansas make the opinion of the Supreme Court a part of the record in the case. See section 21, page 23, vol. 2, General Statutes of Kansas for 1897. This statute reads as follows:

"21. It shall be the duty of the judges of the Supreme Court to prepare and file with the papers in each case full notes of the opinion of the court upon the questions of law arising in the case, within sixty days after the decision of the same; and the opinion so filed shall be treated as a part of the record in the case, but no costs shall be charged therefor except for copies thereof ordered by a party; and no mandate shall be sent to the court below until the opinion provided for by this section has been filed."

After the judgment of affirmance was rendered by the Supreme Court of the State of Kansas, the plaintiffs in error united in taking the case by writ of error to this court. The only questions presented to this court for consideration are those growing out of the application of the Receivers of the Union Pacific Railway Company to remove the case from the State to the Federal court. They are more specifically set forth in our assignment of errors, which we here adopt as our errors assigned:

ERRORS ASSIGNED.

FIRST.

The said Supreme Court of the State of Kansas erred in affirming the judgment of the lower court.

SECOND.

The said Supreme Court of the State of Kansas erred in failing and refusing to reverse the judgment of the lower court.

THIRD.

The said Supreme Court of the State of Kansas erred in holding that the State court had jurisdiction of said cause after the Receivers of the Union Pacific Railway Company had filed a proper petition and bond for the removal thereof to the Circuit Court of the United States for the district of Kansas.

FOURTH.

The said Supreme Court of the State of Kansas erred in holding that the Receivers of the Union Pacific Railway Company, who were appointed by and acting under orders of a Federal court and in charge of property belonging to a Federal corporation, could not remove a case brought against said Receivers and The Chicago, Rock Island and Pacific Railway Company to the Federal court, where the controversy was not a separable one, without being joined in the application for removal by their co-defendant, the said The Chicago, Rock Island & Pacific Railway Company.

FIFTH.

The said Supreme Court of the State of Kansas erred in holding that in a case involving a Federal question wherein the amount in controversy, exclusive of interest and costs, was more than the sum of two thousand dollars, a removal

could not be had to the Federal court, where the controversy was not a separable one, unless all the parties defendant joined in the application for removal.

SIXTH.

The said Supreme Court of the State of Kansas erred in holding and deciding that the State court had jurisdiction to try said cause.

SEVENTH.

The said Supreme Court of the State of Kansas erred in holding and deciding that the petition and bond of the Receivers of the Union Pacific Railway Company for the removal of said action to the United States Circuit Court did not deprive the State court of jurisdiction to try said case.

ARGUMENT.

I.

THIS IS A CASE ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES.

At the time the application to remove was made by the Receivers of the Union Pacific Railway Company, it appeared from the record that they were appointed Receivers by a Federal court; it also appeared from the record that the Union Pacific Railway Company was a Federal corporation. These facts being true, it follows conclusively from the decisions of this court that a Federal question was involved.

Pacific Removal Cases, 115 U. S. 1.
Ames v. Union Pacific, 111 U. S. 449.
Tex. & Pac. Ry. Co. v. Cody, 166 U. S. 606.
Tex. & Pac. Ry. Co. v. Cox, 145 U. S. 593.

II.

AS THE REMOVAL WAS SOUGHT ON THE GROUND THAT THE CASE WAS ONE ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES, THE REQUIREMENTS OF THE LAW WERE SATISFIED BY HAVING THE APPLICATION MADE BY THE PARTIES ENTITLED TO RAISE THE FEDERAL QUESTIONS INVOLVED, WITHOUT JOINING THEIR CO-DEFENDANT.

The Supreme Court of Kansas held that the Receivers of the Union Pacific Railway Company were not entitled to remove the case to the Federal court, because of the fail-

ure of their co-defendant, The Chicago, Rock Island and Pacific Railway Company, to join in the application. Our contention is, that where the removal is sought upon the ground that a Federal question is involved, it is not necessary for all of the defendants to petition for the removal; that it is sufficient if all of the defendants who are entitled to raise the Federal question, join in the application.

The Receivers of the Union Pacific Railway Company were the only parties defendant who could remove the case on the ground that it was one arising under the Constitution and laws of the United States; and as they applied for the removal, the State court lost jurisdiction of the case, notwithstanding the fact that The Chicago, Rock Island & Pacific Railway Company filed its answer there.

In order to obtain a more thorough understanding of the question involved, it may be proper to extend our investigation as far back as the Judiciary Act of 1789. By the terms of that act the Circuit Courts of the United States had jurisdiction of all suits of a civil nature at common law, or in equity: (1) Where the United States were plaintiffs or petitioners; (2) where an alien was a party; (3) where the suit was between a citizen of the State where the suit was brought, and a citizen of another State. The removal of cases was provided for in the following instances: (1) Where the suit was commenced against an alien; (2) where the suit was by a citizen of the State in

which the suit was brought, against a citizen of another State; (3) in cases involving the title of lands based upon grants from other States when adverse party claimed under grant from the State where suit was pending.

It will thus be seen that the Judiciary Act made no provision for original jurisdiction in the Circuit Courts of the United States, of cases arising under the Constitution and laws of the United States, nor for the removal of cases from State to Federal courts based upon that ground. Congress seemed satisfied at that time to permit cases involving Federal questions to be first litigated in the State courts, leaving the final determination of the Federal questions involved to be passed upon by the Supreme Court of the United States. The only cases of a civil nature of which the Circuit Courts of the United States were given original jurisdiction outside of those in which the United States were plaintiffs, were those growing out of the diverse citizenship of the parties, or alienage. And such were substantially the only cases which could be removed.

The act of 1789 may be characterized as a statute where the right to remove a case from a State court into a court of the United States was made to depend upon citizenship or alienage.

It was very early held by the courts, that in order to justify a removal under the act of 1789, all of the plaintiffs must be citizens of the State in which the suit was brought, and that all of the defendants must be citizens

of States other than the one in which the suit was brought. It was furthermore held under this act, that in order to effect a removal, all of the defendants must join in the application. These decisions have been followed by the courts under the different statutes which have been passed providing for the removal of cases from State to Federal courts *on the ground of diverse citizenship*. The recent decisions upon this point refer back to, and are based upon, the decisions made under the original Judiciary Act of 1789.

On March 2, 1833, Congress passed an act authorizing the removal of certain cases arising under the Constitution or laws of the United States. This was the first instance in which Congress conferred jurisdiction upon United States Circuit Courts in civil cases based upon this ground.

This act provides for the removal of cases commenced in the State courts against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority or title set up or claimed by such officer or other person under any such law of the United States.

The act declares that in such cases it shall be lawful for the *defendant* to remove the case to the Circuit Court of the United States. Under this act authorizing the *defendant* to remove the case, it has been held that the re-

moval may be had if it be applied for by the defendant who raises the Federal question, without his co-defendants joining in the application. In other words, it has been decided by the courts that under this statute it was not necessary for all the defendants to join in order to effect a removal. It will be observed that this is contrary to the practice where the case is removed by reason of the citizenship of the parties. Under the Judiciary Act of 1789 "the defendant" was permitted to remove the case, and that was held to mean *all* the defendants. Under the act of 1833 "the defendant" was given the right to remove the case, and that was construed to mean, not all the defendants, but only those who were affected by the Federal question involved.

On March 3, 1863, another act was adopted under this clause of the Constitution, authorizing the removal of cases for acts done during the war of the Rebellion under authority of the President of the United States or any act of Congress. By the terms of that act "the defendant" was given the right to remove the case, and this was construed to mean the defendant affected by the Federal question.

The same principles are applicable to the act of April 9, 1866, authorizing the removal of cases involving the civil rights of citizens of the United States, where the removal is made upon the application of "the defendant."

On July 27, 1868, Congress passed another act author-

izing the removal of certain other cases arising under the Constitution or laws of the United States. That act provided for the removal of suits against Federal corporations or their members. Under its provisions Federal corporations or their members might remove cases without their co-defendants uniting with them in the application.

The various questions arising upon the removal of cases, based upon the fact that they arose under the Constitution or laws of the United States, were exhaustively considered by Judge BLATCHFORD, afterwards Associate Justice of this court, in the case of *Fisk v. Union Pacific Railroad Company*, reported in 6 Blatchford, 362. That was a case originally instituted in the Supreme Court of New York by James Fisk, Jr., against the Union Pacific Railroad Company, a corporation organized under the laws of the United States, and twenty-three other defendants. It was removed to the United States Circuit Court for the Southern District of New York. The jurisdiction of the Federal Court was assailed upon the ground, among others, that the petition for removal was not joined in by all the defendants. The court held that it was not necessary for all the defendants to join in the application to remove, and held jurisdiction of the case. In the course of the opinion Judge BLATCHFORD said (p. 373):

"It is quite apparent that the jurisdiction which Congress intended to give, under this act of 1833, where a suit or prosecution is commenced against any officer of the

United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer, or other person, under any such law of the United States, is to be such a jurisdiction that a plaintiff in a State court shall not be able to deprive such officer or other person, who is sued on account of an act done under the revenue laws, of the right to remove the suit into a court of the United States, under this statute, *by joining with him in the same suit other defendants who are not sued on account of acts done under the revenue laws.* Thus to deprive the Federal court of jurisdiction of the case, would be to deprive the officer or person justifying under the revenue laws, of the power to have his rights adjudicated from the commencement by the Federal court, and to compel him to follow the case through the State courts in all of its stages, and finally take it, under the 25th section of the Judiciary Act, to the Supreme Court of the United States. No such construction of this law has been admitted, so far as I am aware. The manifest intent of this statute, in saying that 'it shall be the duty of the said State court to stay all further proceedings in such cause, and the said suit, or prosecution, upon delivery of such process, or leaving the same, as aforesaid, shall be deemed and taken to be moved into the said Circuit Court, and any further proceedings, trial, or judgment therein in the State court, shall be wholly null and void,' is to remove *the suit.* The suit goes into the Federal court, with all the parties to the suit. Every party to the suit is brought into the Federal court when the suit is brought there, and the court, in obtaining jurisdiction of the suit, obtains jurisdiction over all the parties to it. It is plain that this must be the construction of the act of 1833, or it would be mere waste paper. Otherwise, a plaintiff would have it in his power to deprive an

officer of the United States, who justified his acts under the revenue laws, from ever removing the cause into the Federal court, by joining with such officer, as a defendant, some other person, or other causes of action, no matter how incongruous or irrelevant."

The court then declares that the same principles apply to the act of March 3, 1863, which provides for the removal of suits brought against officers or other persons for arrests made or wrongs done during the war of the Rebellion, by virtue of or under color of any authority derived from, or exercised under the President of the United States, or any act of Congress. That act provides that *the defendant* may petition for the removal of the cause, etc. After reciting the provisions of the act the court goes on to say (p. 375):

"This act thus provides for removing the whole suit, no matter who the parties are, and no matter what relief is sought to be obtained in the suit, provided there is found in the suit, as an ingredient therein, a claim against an officer, or any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the Rebellion, under color of any authority derived from, or exercised by, or under, the President of the United States, or any act of Congress. If such ingredient is found in the suit, the whole suit goes into the Federal court. If this were not so, then, as in the case of the act of 1833, a plaintiff could deprive a party of all remedy under this statute."

This point was also fully considered by Mr. Justice Nelson, and passed upon by him on a motion to remand,

in the same case of *Fisk v. Union Pacific Railroad Company*, 8 Blatchford, 243. In that case it was held "that the joining of defendants in a suit, not within the limitation as prescribed by the act, with those who are, cannot be permitted to withdraw a cause from the jurisdiction of the Federal courts."

After stating this proposition of law, Mr. Justice NELSON proceeds to give the following reasons therefor (p. 248):

"If this were admitted, the privilege extended to the parties setting up a right under the Constitution and laws of the United States, would, in most, if not in every instance, be defeated. Indeed, if any such principle could be admitted, most of these acts of removal, depending principally upon the subject-matter, and intended to secure the interpretation of the Constitution and laws of the United States, at the original hearing, to its own judiciary, would be futile and worthless.

"The act of 1833, which provides for the removal of suits against an officer of the United States, or other person, for acts done under the revenue laws, could be readily evaded, by joining one or more persons with him not acting in that capacity. If these outside parties are deemed material, or are really material, to a complete remedy in behalf of the plaintiff, they must be regarded as subordinate and incidental to the principal litigation in respect to which the act of Congress has interposed the remedy of removal. In this way, the right of the parties to have their defense under the Constitution or laws of the United States, tried in the Federal courts, is secured, and, at the same time, the remedy of the plaintiff is unimpaired."

On March 3, 1875, Congress conferred jurisdiction upon the Circuit Courts of the United States in *all* suits of a civil nature arising under the Constitution or laws of the United States, where the matter in dispute exceeded, exclusive of costs, the sum of five hundred dollars. Removals were also authorized in such cases from the State to the Federal courts. The act of March 3, 1887, is similar in this respect to the act of March 3, 1875, except as to the amount involved.

The jurisdiction of the Federal courts under this clause of the Constitution was a matter of gradual growth, brought about by political and historical events which seemed to make the increase of Federal jurisdiction a National necessity.

The act of March 2, 1833, grew out of the Nullification troubles in South Carolina during the administration of President Jackson; the act of March 3, 1863, was made necessary by the war of the Rebellion; the act of April 9, 1866, was brought about by the emancipation of the slaves; and the act of July 27, 1868, resulted from the construction of the Pacific railroads.

It was the intention of Congress in passing these various acts to make it possible for the National Government, through its judicial tribunals, to more promptly assert its constitutional powers, and to make it impossible for State courts or officials to embarrass or obstruct the administration of Federal laws.

These acts permitted litigants to present controversies involving certain Federal questions, to Federal courts, to be determined there in the first instance, without going to the trouble, expense and delay of litigating them in hostile tribunals before reaching the courts specially charged with the duty of deciding such controversies.

The object which Congress had in view in the passage of these various laws would have been in a large measure defeated if they had been construed by the courts to mean that a removal could not be had under them unless *all* the defendants joined in the application for the removal. It would have been remarkable, if in its efforts to place controversies involving Federal questions beyond the power of adverse State interests and influences, Congress had made it possible for opposing parties to thwart its will by uniting with the defendant affected by the Federal question, other defendants not so affected, and whose desire would be to remain in the State court.

The proposition that a person having a defense arising under the Constitution or laws of the United States cannot be deprived of his right to maintain his defense in the Federal courts by joining other defendants not affected by the Federal question, is well enforced by the decision of this court in the case of *Sonnenthiel v. Christian Moreleín Brewing Co.*, 172 U. S. 401. In that case it was moved to dismiss upon the ground that the jurisdiction of the court depended upon the citizenship of the parties, and

therefore the decision of the Circuit Court of Appeals was final. This court held that as one of the defendants was a United States Marshal, the court had jurisdiction of the case as one arising under the Constitution and laws of the United States. This court also held that the joinder of another defendant, jurisdiction over whom was dependent upon diversity of citizenship, deprived the Marshal of no right he otherwise would have possessed. We quote from the opinion, which was written by Mr. Justice Brown (p. 405):

"The joinder of another defendant, jurisdiction over whom was dependent upon diversity of citizenship, deprived the marshal of no right he otherwise would have possessed. Though there are two defendants, the case was *one*, and that a case in which the jurisdiction was not dependent *entirely* upon the opposite parties to the suit being citizens of different States. Had two suits been brought, one of them would undoubtedly have been dependent upon citizenship, and the other a case arising under the laws of the United States. But as the plaintiff chose to join both defendants in a single action, jurisdiction of that action was not *wholly* dependent upon either consideration. Had the jurisdiction of the Circuit Court been originally invoked solely upon the ground of diversity of citizenship as applied to the Brewing Company, the case would have fallen within the *Colorado Central Mining Company v. Turck*, 150 U. S. 138, but as the original petition declared against Dickerson as marshal, for an official act as such, that case has no application."

When, in 1875, Congress still further enlarged the jurisdiction of Federal courts in civil cases arising under

the Constitution or laws of the United States by giving them jurisdiction in *all* such cases when the amount in dispute was sufficient, the principles governing the removal of such cases remained the same as they were when the jurisdiction was limited to certain specified classes of cases arising under the Constitution or laws of the United States. *In other words, the law simply enlarged the class of cases which might be removed, without changing the principles applicable to such removals.*

If under the acts of 1833, 1863, 1866, and 1868, authorizing the removal of certain cases arising under the Constitution or laws of the United States, a defendant affected by the Federal question involved could remove the cause without his co-defendant joining in the application for removal, then it follows that the same thing may be done under the acts of 1875 and of 1887. The decisions of the Federal courts have been almost uniform in holding that one of several defendants could, under the acts of 1875 and 1887, remove a case arising under the Constitution or laws of the United States. We give herewith a list of the cases bearing upon this point:

A case directly in point, and which should settle the question at issue, is that of *Mitchell v. Smale*, 140 U. S. 406. In that case plaintiff, a citizen of Illinois, sued in ejectment to recover possession of lands in that State claimed to have been granted to plaintiff's ancestors by a patent of the United States; making Jabez G. Smale, ten-

ant, and John I. and Frank I. Bennett, alleged to be the landlords, defendants. The Bennetts made special appearance, and moved that Conrad N. Jordan be substituted in their stead as defendant, on the ground that they had conveyed the property to Jordan before the commencement of the suit, and no longer had any interest in it. The motion was overruled, and thereupon Jordan was admitted to defend the cause as landlord and as co-defendant. Jordan thereupon petitioned for a removal of the cause under the act of 1875, on account of the diverse citizenship of the parties, claiming that the sole controversy in the case was between himself, a citizen of New York, and the plaintiff, a citizen of Illinois. Objections to the removal being made, Jordan amended his petition for removal by alleging that the title in controversy was based upon patents issued by the United States, and that therefore the case was one arising under the Constitution and laws of the United States. The court discusses the question as to whether the sole controversy in the cause was between Jordan and the plaintiff, and while it seems conceded that Smale was not a necessary party, yet it was held that the plaintiff had a perfect right to insist upon prosecuting his action against the Bennetts as well as against Jordan, so that there might be no failure of a complete recovery in the event of the plaintiff being made successful. The court states that on account of the Bennetts "there may have been great diffi-

culty in sustaining a removal," and then proceeds to hold as follows (p. 410):

"But be this as it may, we think that the additional ground of removal, stated in the amended petition, was sufficient to authorize the removal to be made. It states very clearly that the controversy between the parties involved the authority of the Land Department of the United States to grant the patent or patents under which the defendant claimed the right to hold the land in dispute after and in view of the patent under which the plaintiff claimed the same land. This, if true, certainly exhibited a claim by one party under the authority of the Government of the United States, which was contested by the other party on the ground of a want of such authority. In the settlement of this controversy, it is true, the laws of the State of Illinois might be invoked by one party or both; but it would still be no less true that the authority of the United States to make the grant relied on would necessarily be called in question. We are, therefore, of opinion that the ground of removal now referred to presented a case arising under the laws of the United States, and so within the purview of the act of 1875. The amendment was properly allowed, and no valid objection exists in regard to the time of the application."

It will thus be seen that the court sustained the removal although but one of the defendants petitioned for it, on the ground that the case was one arising under the Constitution or laws of the United States. It cannot be claimed that the court's attention was not called to the fact that but one of the defendants applied for the removal, because one of the questions in the case, which was discussed at considerable length, was, whether the case could be re-

moved by one of the defendants on the ground of a diversity of citizenship. Furthermore, it is a well-established rule of this court, that it does not wait for jurisdictional questions to be raised by the parties. The court raises them itself, and it cannot be supposed that this court failed to note the fact that only one of the several defendants petitioned for the removal.

This question was passed upon by Judge Ross in the case of *Southern Pacific R. Co. v. Townsend,* 62 Federal Reporter, 161. The syllabus in that case reads as follows:

"A suit to enforce a contract for sale of land, brought by the vendor, claiming title under a grant by act of Congress, against the purchaser and another to whom he had conveyed, who contests complainant's claim under such act, presents a case arising under the laws of the United States, which is removable on petition of such defendant alone, although the purchaser, not joining in the petition, is not a merely nominal party, and complainant is entitled to proceed to judgment against him."

The point at issue is thus stated in the opinion, page 165:

"The petition shows that the controversy respecting that matter necessarily involves the consideration of the act of Congress of March 3, 1871, exhibiting as it does a claim under that act on the part of the complainant, which is contested by the removing defendant. It therefore presents a case arising under the laws of the United States, and so removable to this court, unless the fact that there is another defendant who did not join in the petition defeats the removal. But that a single defendant may in such a case bring it to the Federal court, seems to

have been decided by the Supreme Court in the case of *Mitchell v. Smale,* 140 U. S. 406."

The court then summarizes the facts in the Smale case, and quotes from the opinion of the court. It then proceeds as follows:

"The manifest view of the court was that the Bennetts were proper parties as to whom the plaintiff had the right to proceed to judgment. They did not join in the petition for removal, yet the court held that the additional ground of removal stated in the amended petition was sufficient to authorize the removal to be made. . . . The decision of the Supreme Court in the case of *Mitchell v. Smale* is applicable to the removal in question, and upon the authority of that case, the motion to remand is denied."

To the same effect is the decision of Judge TAFT in the case of *Landers v. Felton,* 73 Fed. Rep. 311. In that case a petition for removal was filed by S. M. Felton, the receiver of a railroad company appointed by a Federal court. There were other defendants, who did not join in the application for the removal. The court held that the removal was properly made. The opinion of the court upon the point involved reads as follows (p. 314):

"The question here arises whether an action brought against the receiver of a United States court, and others, who are citizens of the same State as that of the plaintiff, to establish a joint liability of all the defendants, is a suit arising under the laws and Constitution of the United States. I do not see how it can be otherwise. No separate liability could be asserted against the receiver, as

receiver, except under the laws of the United States. If no separate liability could be asserted against him, except by virtue of those laws, certainly no joint liability with another can be asserted against him, except by virtue of the same laws. Therefore the joint liability of the defendants with the receiver arises under the laws and Constitution of the United States. If the plaintiff wished to sue the other defendants without joining the receiver, he had his election to do so, because the liability of joint tort feasors is also several. He might, therefore, have maintained his action against the resident defendants in a State court, without any possibility of removal to a Federal court. He elected, however, to join the resident defendants with a person against whom he could establish no liability, in the capacity in which he sues him, except by virtue of the laws of the United States. Therefore the joint cause of action which he asserts against all the defendants must find its sanction in the Federal statutes. Hence the cause of action is removable. The State court was in error in denying the petition of the receiver, and the motion to remand is overruled."

A case of similar import is that of *Lund v. C. R. I. & P. Ry. Co., et al.*, 78 Fed. Rep. 385. That was a joint action against the Rock Island Company and the Receivers of the Union Pacific Railway Company, to recover damages for personal injuries. The application for removal was made by the Receivers of the Union Pacific Railway Company upon the ground that the case was one arising under the Constitution and laws of the United States. The court sustained the removal.

Judge HANFORD considers this question in the case of *Seattle & M. Ry. Co. v. State, et al.*, 52 Fed. Rep. 594.

In remanding a case which was sought to be removed on the ground of a Federal question being involved, the court used this language (p. 596):

"I have considered the point made by the counsel for the plaintiff, that all the defendants did not join in petitioning for the removal of the cause to this court, but I am unwilling to rest my decision granting the motion to remand on that ground. The decisions of the Supreme Court, which were cited upon the argument, do not support counsel in the position taken. A case not cited by counsel on either side is to the contrary: *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. Rep. 819, 840. True, the opinion does not in words declare that a case arising under the laws of the United States can be removed from a State court to a United States Circuit Court, by the petition of only one of several defendants, but the case was such a case; it was removed upon such a petition; the questions as to the sufficiency of the petition and the jurisdiction of the Circuit Court were contested and were squarely met and decided by the Supreme Court, and the effect of the decision is to affirm the right of one of several defendants to remove a cause, if it be a case at law or in equity, arising under the Constitution or laws of the United States, and cognizable in a Circuit Court."

Respectfully submitted.

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